

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

UNIVERSITY OF NEW HAVEN

Employer

and

UNIVERSITY OF NEW HAVEN POLICE
BENEVOLENT ASSOCIATION

Petitioner

Case No. 34-RC-2155

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer,¹ and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer is a private university offering undergraduate and graduate education at its sole facility located in West Haven, Connecticut (herein called its facility or campus). The Petitioner seeks to represent a unit of 9 full time and regular part-time patrol officers, corporals and sergeants (herein collectively called officers) at its facility.

¹ The record establishes that the Petitioner is an organization in which employees participate and which exists for the purpose of dealing with employers concerning wages, hours and other terms and conditions of work. Contrary to the Employer's contention, the hearing officer did not deny the Employer an opportunity to introduce evidence bearing upon the Petitioner's labor organization status. In this regard, the hearing officer merely sustained objections to questions regarding the identity of the Petitioner's officers, its street address, and its dues structure, none of which are determinative of labor organization status. See *Butler Mfg. Co.*, 167 NLRB 308 (1967). The record further establishes that the Petitioner only admits guards into membership and that it is not affiliated directly or indirectly with any other labor organization. Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and that it is qualified to represent guards within the meaning of Section 9(b)(3) of the Act.

Although otherwise in accord as to the scope and composition of the unit, the Employer, contrary to the Petitioner, would exclude the three sergeants on the ground that they are supervisors within the meaning of the Act. There is no history of collective bargaining regarding any of the petitioned-for employees. For the reasons noted below, I find that the Employer has failed to satisfy its burden of establishing that the sergeants are supervisors within the meaning of Section 2(11) of the Act.

I. Facts

A. Overview of Operations

The Employer's facility consists of approximately 30 academic and residential buildings. There are approximately 4,000 students, 1400 of whom live on campus, and 350 to 400 employees. The police department, which is administratively part of the Student Affairs Division, provides safety, security and law enforcement services to the entire campus. Primarily responsible for the overall operation of the police department is Chief of Police Henry Starkel. Reporting directly to Starkel is Lieutenant David Sweet. Starkel regularly works from 8:30 a.m. to 4:30 p.m., Monday through Friday, whereas Sweet works the same days from 2 p.m. to 10:00 pm. Neither Starkel nor Sweet perform any regular police work in the field. Rather, their duties are primarily administrative in nature and include such matters as planning, budgeting, setting policy and procedures, and dealing directly with students, parents, faculty and the public. Sweet is solely responsible for scheduling all officers. In addition, while they are on duty Starkel and Sweet are considered "in command" of their respective shifts. In this regard, they both monitor all radio transmissions between and among officers and the dispatcher. When not on duty, both Starkel and Sweet are available by telephone to be contacted by officers when necessary.²

B. The Sergeants' duties, responsibilities and terms and conditions of employment

Reporting directly to Lieutenant Sweet are the three disputed sergeants: Ronald Whittaby, who is assigned to the first shift; Christopher Skeens, who is assigned to the second shift; and John Gondor, who is assigned to the third shift. The sergeants, as the highest ranking officer on their respective shift, are generally responsible for overseeing the work performed by the officers who might be assigned to their shift. In this regard,

² The parties agreed to exclude both Starkel and Sweet from the petitioned-for unit, and the record clearly establishes that they are supervisors under Section 2(11) of the Act.

the record does not reflect the exact number of officers who are assigned to each shift, Indeed, there are several shifts on which no other officers are assigned. Moreover, it is undisputed that the sergeants spend the bulk of their time performing the same police duties in the field as other assigned officers. There are also an unidentified number of dispatchers, who the parties have agreed to exclude from the petitioned-for unit.

The position description for “Sergeant (Patrol Supervisor)” sets forth the following “General Statement of Duties”:

Assists the Chief and the Detective/Lieutenant in the administrative operations of all shifts, work functions and operations of the UNH Police Department. Handle patrol liaison with the UNH community. Assist in the planning and coordination of all patrol shift projects and maintain relations with neighboring outside law enforcement agencies.

The position description sets forth the following “Core Duties” for sergeants:

Responsible for the preservation of public peace and order.
Enforcement of the laws of the State of Connecticut and the ordinances of the City of West Haven.
Protection of persons and property.
Protect the rights of members of the University Community.
Enforce the rules and regulations as established by the UNH Student Handbook and other University Policy and Procedure manuals.
Render assistance where health, comfort or safety of UNH community or public is likely to be in danger.
Supervise Patrol Officers and staff on shift.
Assist in the training of new officers in University policies and procedures.
Follow Departmental Chain of Command in the performance of duties.³

Consistent with the above-described position descriptions, the supervision of each shift is strictly governed by the “chain of command”. In this regard, when Chief Starkel or Lieutenant Sweet are on-duty, they are in charge of all officers working that shift. If neither Starkel nor Sweet are available, the sergeant is in charge of all officers working that shift. Whenever a sergeant is not on duty, the corporal is in charge of all officers working the shift. Finally, if neither a sergeant nor a corporal is on duty, a patrol

³ The position description for “Corporal (Patrol Supervisor)” is essentially the same in all significant respects as the Sergeant’s position description, including the “supervision” of patrol officers and staff. The position description for “Patrol Officer-Grade A” contains generally similar duties and responsibilities as the sergeant and corporal, including the requirement to “[a]ssume command of his/her particular work shift as senior officer when there is no Sergeant on duty.” The position description for “Patrol Officer-Grade B” is virtually the same as Patrol Officer-Grade A, but without the requirement for assuming command of the shift in the absence of the sergeant. There are presently no “grade B” patrol officers employed in the department.

officer – grade A is in charge of the officers working the shift. Thus, the patrol officer-grade B appears to be the only officer who is prohibited from commanding a shift. However, as noted above in footnote 2, there are presently no “grade B” patrol officers employed in the police department.

With regard to shift coverage, the record establishes that the three sergeants are assigned to their respective shifts five days per week, on a rotating basis. Thus, their two days off per week will vary depending upon their assigned schedule, which changes each month. Because the sergeants cannot cover all 21 weekly shifts, it appears that several shifts regularly utilize either the corporals or the patrol officers-grade A as the senior officer in command of the shift. As a result, at least 4 shifts have a patrol officer as the senior officer on the shift. As reflected above in footnote 3, while serving as the senior officer in command of the shift, the record establishes that the corporals and patrol officers perform the same duties with the same responsibilities as the sergeants. Thus, consistent with the “chain of command”, any other officer assigned to that shift must follow the corporal’s or patrol officer’s direction. Notwithstanding the foregoing, I note that the Employer does not contend that either the corporals or the grade A patrol officers are supervisors under Section 2(11) of the Act while serving as the senior officer on a shift.

Corporals and patrol officers are similarly assigned to work five days per week on a rotating basis. However, the record does not reflect the number of corporals and patrol officers who are assigned to each shift. Thus, there is no evidence reflecting either the number of officers whose work may be directed by the sergeants, or the frequency that the sergeants may direct the work of other officers. Moreover, as noted above, it is undisputed that there are an unspecified number of shifts each week during which the sergeant is the only assigned officer on duty.

Regardless of the precise number of officers assigned to a particular shift, there is no dispute that all officers may perform any or all of the following functions in the course of their shift: locking and unlocking buildings (which is generally overseen by the sergeants); responding to requests for assistance and other emergencies or alarms; contacting and dealing with the appropriate authorities in the event of an emergency or other special event, including local police and fire departments, gas and electric utilities, and other campus employees and officials; evacuating buildings; and preparing “incident reports” resulting from service calls or other interactions with students and the

public. In performing these functions, all officers, including the sergeants, are required by their position descriptions to “enforce the rules and regulations as established by the UNH Student Handbook and other University Policy and Procedure Manuals.” Thus, if officers, including the sergeants, are confronted with a situation that is not covered by University policies and procedures, or is otherwise “non-routine” in nature, they are expected to contact Starkel and/or Sweet for instructions and guidance on how to proceed. The Sergeants are also expected to inform Chief Starkel of any “problematic” matters that occur in the course of their shift, such as something that might create some liability for the university, or something that might create controversy or generate public interest.

As noted above, Lt. Sweet is solely responsible for the initial scheduling of all officers. In the event that an officer is unable to report to their scheduled shift, the sergeant (or whoever is the senior officer on the shift) is responsible for covering the absence in accordance with the department’s “standard operating procedure”. This procedure basically requires the vacancy to be filled by asking an officer from the previous shift to stay over, and/or by asking an officer from the next shift to report early. If none of those efforts result in covering the shift, the sergeant (or whoever is the senior officer on a shift) will call the remaining officers in the department, by seniority, to see if they can cover the shift, with the least senior officer ultimately required to work the shift. In performing these functions, there is no evidence that the sergeant (or whoever is the senior officer on the shift) can require anyone other than the junior officer to work the shift. Sergeants (or whoever is the senior officer on a shift) may also permit an officer to leave work early in the event of a personal emergency, such as the illness of a family member. However, there is no evidence that the sergeant (or whoever is the senior officer on a shift) may refuse to allow the officer to leave work early. Sergeants also have the authority to send an officer home if they are “incapacitated”, which Chief Starkel defined as “being a danger to himself or others.” All other requests for time off, such as vacations and holidays, as well as requests by employees to “swap shifts”, must be submitted to and approved by Lt. Sweet.

The dispatcher, not the sergeant, initially assigns officers to respond to service calls. Such assignments are made by radio, which is monitored by all officers. Service calls may involve a theft complaint, a hazardous condition, routine inquiries, or any type of emergency situation. The sergeant (or whoever is serving as the senior officer on the

shift) is responsible for monitoring, by radio, the dispatcher's assignments. The sergeant (or whoever is serving as the senior officer on the shift) may contravene the dispatcher's assignment, handle the call himself, or direct additional officers to respond to the call; they may also direct officers to assist with special projects, such as roping off parking spaces for a "special event". There is no dispute that in performing the aforementioned functions, the sergeant (or whoever is serving as the senior officer on the shift) does not consider the skills or abilities of any particular officer. In this regard, the record establishes that every officer is equally capable of performing any assignment.

During an emergency, such as a fire alarm, gas leak, power outage or bomb threat, the sergeant (or whoever is serving as the senior officer on the shift) is responsible for evacuating buildings, contacting the appropriate outside services (such as fire, police, and gas and electric utilities) and serving as a liaison with such outside services, and directing the work performed by the Employer's officers during the emergency.⁴ Such direction involves assigning the other officers, if any were available, to make sure that the building has been evacuated, and then stationing the officers at entrances and exits to insure that no one enters the building until it is safe to do so. However, as noted above, in directing such officers during an emergency, the sergeants do not consider the particular skills or abilities of any officer. Rather, it appears that such direction and assignment is based merely upon who is available on the particular shift to perform such functions. Moreover, Chief Starkel admitted that any officer could make the decision to evacuate a building if the circumstances warranted it, and that it is the outside agency, not the sergeant, who determines when an evacuated building can be re-occupied.⁵

Every officer completes an "incident report" regarding events or issues that arise in the course of a shift. Sergeants review the incident reports prepared by officers on the prior shift to inform themselves of what occurred on that shift and to make sure the reports are complete and accurate. However, there is no evidence that the review of

⁴ There is no evidence or claim that the sergeants direct the work performed by any employees of the outside services. To the contrary, it appears that the sergeants must follow the instructions provided by the outside services.

⁵ The only specific example proffered by Chief Starkel of a sergeant directing officers in response to an emergency occurred several years ago, when a sergeant on the third shift decided to assist the West Haven Police and Fire Departments at the scene of an off-campus condominium fire caused by a gas leak. In doing so, the sergeant directed one or two other officers to assist at the scene as well.

“incident reports” by the sergeants has impacted any officers’ terms and conditions of employment.

Sergeants are responsible for handling incoming calls from the parents of students. In performing that function, they are bound by the confidentiality rules established under the Family Educational Right to Privacy Act. Hereto, there is no evidence indicating that their handling of calls from parents has impacted any officers’ terms and conditions of employment.

With regard to the discipline of officers, the record reveals that the Employer maintains a progressive disciplinary system with four steps: counseling session, letter of reprimand, suspension and termination. All disciplinary actions taken pursuant to the progressive disciplinary system are independently investigated and determined by Chief Starkel or Lt. Sweet, and there is no evidence that the sergeants may issue disciplinary actions pursuant to the progressive disciplinary system. In this regard, although Chief Starkel generally claimed that sergeants have the authority to issue “disciplinary letters of reprimand”, the record reflects that in the event that a sergeant observes a deficiency in an officer’s work performance, the sergeant merely approaches the officer and attempts to correct the deficiency on an informal basis. Such instances are not considered discipline, do not have to be reported to Starkel or Sweet, and are not placed in an officer’s official personnel file. However, if the deficiency or performance problem persists, the sergeant may bring it to the attention of Starkel or Sweet by filing an “internal memo”, which merely sets forth the facts and contains no recommendation. Moreover, any officer may file an “internal memo” with Starkel or Sweet concerning the conduct of any other officer, including the sergeants. Starkel and/or Sweet will then review the memo and advise the sergeant as to the course of action to take, which may include discipline. However, there is no evidence or claim that sergeants recommend in such instances that officers be disciplined, or that Starkel or Sweet have ever disciplined an officer based on a sergeant’s recommendation. In addition, Chief Starkel admitted that “internal memos” are not considered part of the disciplinary system, and that not every “internal memo” results in disciplinary action.

Documents proffered by the Employer show the very limited involvement of sergeants in disciplining officers. In this regard, the record reveals only one such instance involving a July 25, 2005 written “counseling session” issued by Lt. Sweet to Patrol Officer Donna Miller. The “counseling session” apparently resulted from an

incident involving Sergeant Skeen, who prepared an “internal memo” to Sweet documenting the incident. According to the internal memo, Miller had failed to notify the dispatcher that she had arrived at the scene of a burglar alarm. As a result, Sgt. Skeen hurried his response to the scene. The internal memo makes no recommendation, nor is there any evidence that Lt. Sweet solicited Skeen’s recommendation as to what action to take in response to the incident. The only other documentary examples of the sergeants’ involvement in the disciplinary process involved a non-unit employee. In this regard, on February 16, 2005, Sergeant Gondor issued a “Written Record of Counseling Session” to Dispatcher Virginia Allen. As noted above, the parties have agreed to exclude the dispatchers from the petitioned-for unit. The incident involved Allen’s improper handling of a fire alarm. Lt. Sweet instructed Sgt. Gondor to prepare the document. The first paragraph of the document states that “[o]ur conversation was one of counseling in nature, or a re-affirmation of the police response protocol for this type of alarm and this letter is not intended to be a written reprimand.” Thus, no disciplinary action occurred as a result of this incident. On March 9, 2005 (subsequently revised on April 5, 2005), Dispatcher Allen was issued a “letter of reprimand” by Chief Starkel, who apparently relied upon an “internal memo” from Sergeant Skeens regarding the incident. Once again, the “internal memo” makes no recommendation, nor is there any evidence that Chief Starkel solicited Sgt. Skeen’s recommendation as to what action to take in response to the incident.

All annual officer evaluations are prepared by Chief Starkel or Lieutenant Sweet. The only involvement that the sergeants have in such evaluations is that they may be asked by Starkel or Sweet for “input” regarding officers they have worked with. Such evaluations are signed by Lt. Sweet as the officers’ “supervisor”. Sergeants may also supply Chief Starkel with their “opinions” and “impressions” of officers who are completing their one-year probationary period.

Both Starkel and Sweet generally testified that sergeants are held “accountable” for the work performed on their shift. The only specific instance proffered in support of this general testimony involved an officer who was reluctant to perform “escort” services for students without using the patrol car that had a “security cage”. Sergeant Gondor reported the situation to Lt. Sweet, who instructed Sgt. Gondor that the officer was not permitted to use the patrol car with the security cage to perform such escorts, and that he “would hold him accountable to make sure that didn’t occur.” However, Lt. Sweet did

not explain how he would hold Sgt. Gondor accountable in such instance, nor is there any evidence that he was ever held accountable for it. Moreover, Lt. Sweet acknowledged that Sgt. Gondor had no discretion to countermand his instructions regarding the escort procedure. There is also no evidence that any sergeant has ever been disciplined for failing to properly supervise the work performed by officers on their shift. The Employer proffered the annual evaluations of several sergeants in support of its contention that the sergeants are held accountable for the work performed by the officers on their shift. Those evaluations generally reveal that the sergeants are rated on their direction and “first line supervision” of the officers on their shift. Although Starkel testified that evaluations have “some weight in terms of a person’s annual increase”, he also testified that he does not determine annual wage increases, which are instead determined by the University.

All officers share the same terms and conditions of employment, including payment on an hourly basis with time and one-half for overtime. They all wear the same uniform, except for the indication of their rank, and all carry a gun. Sergeants are paid approximately \$3000 to \$5000 more per year than corporals, with the same approximate wage differential between the corporals and patrol officers. There is an office used for fingerprinting located in the police department that may be used by the sergeants in the course of their shift. Only two of the three sergeants use the office. One sergeant has taken on the additional responsibility of serving as the police department’s certified “fire arms instructor” and “field training officer”. The firearms instructor is responsible for testing all officers on the proper use and safety of firearms, and the field training officer is responsible for training new officers. However, Lt. Sweet acknowledged that being a sergeant is not a prerequisite to serving in either position.

Newly appointed sergeants also attend a course at the State of Connecticut police academy entitled “First Line Supervision”. However, no evidence was proffered as to the contents of that course. According to Chief Starkel, he advises all newly appointed sergeants, after they attend the above-described course, that they are in charge of the shift and that they are expected to insure that the officers under their command are doing the things that they should be doing and acting in the best interests of the University of New Haven. Sergeants do not attend supervisory meetings.

Sergeants (or whoever is the senior officer on the shift) are also responsible for directing the work performed by non-unit student employees. In this regard, the police

department employs approximately 7 student employees, who may be paid by the University on a “work-study” basis, or who may be employed directly by the police department. Such student employees generally assist the officers by locking and unlocking buildings and classrooms, delivering mail, answering the phone, and dispatching calls. There is no evidence as to the percentage of time that the sergeants spend directing the work performed by these student employees.

II. Conclusion

It is well established that the burden of proving supervisory status is on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Sears Roebuck & Co.*, 304 NLRB 193 (1991).

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that the sergeants possess and exercise supervisory authority within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note the undisputed absence of any evidence that the sergeants have the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, or reward other employees, or to adjust their grievances, or to effectively recommend any of these actions using independent judgment. Thus, the only arguable basis for finding that the sergeants are supervisors is their assignment and direction of work performed by officers, and their involvement in the evaluation and discipline of officers.⁶

With regard to the assignment and direction of work, sergeants have no input into the initial scheduling or assignment of officers. Rather, all scheduling is done by Lt. Sweet, and all service calls are made by the dispatcher. To the extent that the sergeants re-assign or direct officers to perform other assignments in the course of a shift, such authority is routine in nature and guided by non-discretionary factors, primarily availability, as well as the Employer’s established policies and procedures.

⁶ Contrary to the Employer’s contention, the sergeants’ assignment and direction of the work performed by student employees is insufficient to confer supervisory status. In this regard, it is well established that in order to exclude an individual as a supervisor based upon their alleged supervision of non-unit employees, there must be an affirmative showing that over 50 % of their time is spent on such supervisory duties. *Amalgamated Clothing Workers Union, AFL-CIO*, 210 NLRB 928, 930 (1974); *New York University*, 205 NLRB 4, 8 (1972); *Adelphi University*, 195 NLRB 639 (1972). The Employer proffered no evidence regarding the amount of time that the sergeants spend directing the work of the student employees, who the parties agreed to exclude from the petitioned-for unit.

Under such circumstances, their assignment and direction of the work performed by other officers does not require the exercise of independent judgment. *S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111 (1996)(leadman); *Chevron Shipping Co.*, 317 NLRB 379 (1995)(watch officers); *Leland Stanford Jr. University*, 194 NLRB 1210, 1214 (fire captains)(1972); *Security Guard Service, Inc.*, 154 NLRB 8 (1965)(shift supervisor).⁷ In addition, there is insufficient evidence to establish that sergeants can require any employee to report to work, or that they have ever done so. See *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1335 (2000). To the extent that the sergeants have any impact upon the assignment or direction of officers at the scene of an emergency, there is no evidence that they make such determinations based upon their own assessment of either the relative skills and abilities of the officer or the nature and extent of the work being assigned. See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Quality Chemical, Inc.*, 324 NLRB 328, 330 (1997); *Kent Products, Inc., White Cloud Division*, 289 NLRB 824 (1988). Here to, such determinations appear to be dictated by non-discretionary factors, primarily the availability of other officers. I also note that the sergeants' duties and responsibilities are closely circumscribed by University policies and procedures, which significantly minimize the extent of the sergeants' discretionary decision making vis-à-vis other officers. See *Dynamic Science, Inc.*, 334 NLRB 391 (2001). In addition, Chief Starkel and/or Lt. Sweet may always be contacted by the sergeants during an emergency or other non-routine situation. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989). Finally, I note that the sergeants' authority to send officers home for being "incapacitated" is not an indicium of supervisory authority. See *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000); *Chevron Shipping Co.*, supra; *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

⁷ Those Board decisions involving the supervisory status of guards, cited by the Employer in its post-hearing brief, are clearly distinguishable from the instant case. In *Greenbrier Hotel*, 216 NLRB 721 (1975), shift leaders were found to be supervisors where they regularly supervised 6-8 guards, there was a regular absence of higher authority, and they could authorize overtime. In *Pioneer Hotel and Gambling Hall*, 276 NLRB 694 (1985), a security lieutenant was found to be a supervisor where he scheduled employees, granted sick leave and overtime, issued oral reprimands, and effectively recommended the hiring and discharge of employees. In *Giant Food, Inc.*, 252 NLRB 1308 (1980), a security lieutenant was found to be a supervisor where he performed no guard work, prepared work schedules, initialed time cards, and effectively recommended discipline. Finally, in *The Wackenhut Corp.*, 226 NLRB 1085 (1976), security lieutenants were found to be supervisors where they issued verbal reprimands and warnings to employees.

With regard to the sergeant's involvement in officer evaluations, their mere verbal input into the evaluations prepared by Chief Starkel and Lt. Sweet, and Starkel's determinations regarding the probationary status of officers, are insufficient to confer supervisory status, particularly in the absence of any evidence that their input has directly affected the job status of any employee. See *Quality Chemical, Inc.*, supra; *Nymed, Inc. d/b/a Ten Broeck Commons*, 320 NLRB 806, 813, n. 12 (1996); *Arizona Public Service Co.*, 310 NLRB 477, 480 (1993).

With regard to their involvement in the disciplinary process, I find that the sergeants are essentially conduits of information and that their responsibility is merely reportorial in nature. See *NLRB v. Meenan Oil*, 139 F.3d 311 (2nd Cir. 1998); *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998); *Peco Energy Co.*, 322 NLRB 1074, 1083 (1997); *Rest Haven Nursing Home*, 322 NLRB 210, 212 (1996). More particularly, I note that although they may informally "counsel" officers regarding their work performance, there is no dispute that such counseling is not considered disciplinary in nature, and that all decisions to issue formal discipline are made by Chief Starkel or Lt. Sweet. Moreover, there is no evidence that any sergeant has ever recommended that an officer be disciplined, or that Chief Starkel or Lt. Sweet have ever solicited a sergeant's recommendation regarding the discipline of an officer. Finally, I note that two of the three examples proffered by the Employer to show the sergeant's involvement in the disciplinary process involve a dispatcher, who the parties agreed to exclude from the petitioned-for unit. As noted above, it is well established that in order to exclude an individual as a supervisor based upon their alleged supervision of non-unit employees, there must be an affirmative showing that over 50 % of their time is spent on such supervisory duties. *Amalgamated Clothing Workers Union, AFL-CIO*, supra; *New York University*, supra; *Adelphi University*, supra. In this regard, the Employer proffered no evidence regarding the amount of time that the sergeants spend directing the work of the dispatchers.

In reaching the above findings and conclusions regarding the supervisory status of the sergeants, I have considered the Second Circuit's decision in *NLRB v. Quinnipiac College*, 256 F.3d 68 (2001), which the Employer cites in its post-hearing brief. In that case, the Second Circuit reversed the Board's decision that "shift supervisors" in a 30 person university security department were not supervisors within the meaning of Section 2(11) of the Act. In reaching that conclusion, the Second Circuit concluded,

contrary to the Board's decision, that the shift supervisors engaged in three of the indicia set forth in Section 2(11): assigning other employees, responsibly directing other employees, and effectively recommending discipline of other employees.

Initially, I note that the Second Circuit's decision is contrary to well-established Board law that I am bound to apply in the instant case, and that the Board has not to date adopted the Second Circuit's decision in *Quinnipiac*. Nevertheless, as described in detail below, I find that the facts and rationale underlying the Second Circuit's *Quinnipiac* decision are inapposite to the facts of the instant case.

With regard to the assignment of employees, the Second Circuit in *Quinnipiac* noted that in re-assigning or re-deploying employees, the shift supervisor utilizes independent judgment by specifically considering "the employees' experience and capability to respond to a particular incident, as well as other campus security needs and requirements". In the instant case, the evidence is exactly the opposite: sergeants do not consider an officer's particular skills and abilities in re-assigning or re-deploying them.

With regard to the direction of employees, the Second Circuit in *Quinnipiac* concluded that the shift supervisors' "responsibly directed" employees utilizing independent judgment because the record established that they were held accountable for the failure of other employees to perform their duties, thereby showing that they were "in command" of their shift. In reaching this conclusion, the Second Circuit relied upon two disciplinary actions issued to shift supervisors for failing to properly supervise other security department employees. The Second Circuit interpreted such disciplinary actions as supporting the notion that the employer viewed the shift supervisors as being responsible for the performance of other security department employees, that is, being "in command". In the instant case, the evidence is again exactly the opposite: sergeants have never been disciplined for failing to properly supervise other officers. Thus, the mere label that the sergeants are "in command" of their respective shifts in the absence of Chief Starkel and Lt. Sweet is insufficient, standing alone, to establish that they responsibly direct the work of other employees as contemplated by the Second Circuit in *Quinnipiac*. This is particularly so in the instant case where, as noted above, such direction does not require the use of independent judgment.

Finally, with regard to the discipline of other employees, the Second Circuit in *Quinnipiac* acknowledged the Board's finding that the shift supervisors could

recommend that employees be disciplined, and concluded, contrary to the Board, that such recommendations were effective even though they were subject to an independent investigation by others. In the instant case, the evidence is, yet again, the opposite from what the Second Circuit relied upon in *Quinnipiac*: there is no evidence that sergeants recommend that disciplinary action be taken, or that Chief Starkel or Lt. Sweet have ever relied upon a sergeant's recommendation in issuing discipline.⁸

The Employer's reliance on certain secondary indicia of supervisory status, including employee and public perception, job title, higher pay, access to an office, and the fact that sergeants are at times the highest authority in the Employer's police department, cannot confer supervisory status in the absence of the primary indicia of supervisory status enunciated in Section 2(11) of the Act. See *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1361 (2000); *Ryder Truck Rental, Inc.*, supra, 326 NLRB at 1387 n. 8; *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, supra. In this regard, I note that supervisory status under the Act cannot be accorded to the sergeants simply because of the important responsibilities imposed upon them and the conceivable implications of their actions during an emergency. While their good judgment and skill certainly impacts upon the safety and well being of other officers and the public during an emergency, it is an insufficient basis upon which to establish their supervisory status under the Act. See *Mississippi Power and Light Co.*, 328 NLRB 965, 968-971 (1999), citing *Northeast Utilities Service Company v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994).

Finally, to the extent that secondary indicia may be applicable, I note that a finding of supervisory status of the three sergeants would create an extremely low and unrealistic ratio of supervisors to unit employees (i.e., five supervisors for six unit employees, a ratio of almost 1:1), but that a finding of non-supervisory status would not

⁸ Moreover, the facts of the instant case are precisely those noted by the Second Circuit in *Quinnipiac* regarding its earlier decision in *NLRB v. Meenan Oil*, supra, 139 F.3d 311, in which it affirmed the Board's finding that the employer's oil and service dispatchers were not supervisors under the Act. In this regard, the Second Circuit in *Quinnipiac* noted that in *Meenan Oil*, the alleged supervisor simply notified management that there was a problem with an employee and made "no recommendation as to whether the employee should be disciplined." Thus, according to the Second Circuit, the alleged supervisor in *Meenan Oil* had acted merely as a "conduit for information and exercise[d] no judgment in passing the knowledge along to management." In the instant case, the evidence shows that sergeants must first discuss their concerns about a patrol officer's work performance with their supervisor, who in turn decides whether the sergeant should initiate the disciplinary process. Moreover, even on the sole occasion where a sergeant's internal memo actually resulted in an officers' discipline, there is no evidence that the sergeant played any role in determining whether or to what extent the officer would be disciplined.

create an unreasonably high ratio (i.e., two supervisors for nine unit employees, a ratio of less than 5:1). See *Arizona Public Service Co.*, 310 NLRB 477, 481 (1993); *McAlester General Hospital*, 233 NLRB 589 (1977); *Brattleboro Memorial Hospital*, 226 NLRB 1036, 1038 (1976). Moreover, as noted above, the record establishes that corporals and patrol officers regularly serve as the senior officer on a shift, with all the attendant duties and responsibilities of the sergeants. If sergeants were found to be supervisors, then arguably all corporals and patrol officers who regularly fill the sergeant position would also be excluded from the petitioned-for unit, creating the anomalous situation where every unit employee is a supervisor.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All full time and regular part-time patrol officers, corporals and sergeants employed by the Employer at its West Haven, Connecticut facility; but excluding all other employees, student employees, dispatchers, lieutenants, the chief of police, office clerical employees, and professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notice of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by University of New Haven Police Benevolent Association.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before December 21, 2005. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by December 28, 2005.

Dated at Hartford, Connecticut this 14th day of December, 2005.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34